No. 11,165

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERIGO BELLUOMINI,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*
EDGAR RUGGIERO,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

The brief filed by appellee is entirely devoted to answering arguments that appellants **never made** and ignoring those which appellants **did make.** Both the time and the space allotted by the rules of this honorable Court for appellants to reply are extremely brief; but they are both amply sufficient in which completely, decisively, conclusively and finally to refute and dispose of every contention made by the Government.

I.

APPELLEE MAKES NO ATTEMPT TO ANSWER THE ARGUMENT OF APPELLANTS THAT THE VIOLATION OF A RATIONING ORDER IS NO CRIME, BECAUSE CONGRESS HAS PRESCRIBED NO PENALTY FOR SUCH VIOLATION.

We made it sufficiently clear, we think, in our Opening Brief, that the alleged crime of which these defendants have been convicted was not created by Congress but by the Price Administrator himself. (See Appellants' Opening Brief, pp. 22-23.) We there set forth the history of war powers legislation, quoting the pertinent provisions of the statutes and the executive and administrative orders *in haec verba.*

It must be borne in mind that we are here dealing with a case where men are being subjected to punishment for crime, and that there must be a clear legislative basis to support a charge of crime.

> *U. S. v. George,* 228 U. S. 14, 33 S. Ct. 411, 57 L.ed. 712.

Crimes cannot be created by intendment, inference, or presumption,

> "Crimes are not to be built up by courts with the aid of inference, implication and strained interpretation, and penal statutes must be construed to reach no further than their words; **no person can be made subject to them by implication.**"
>
> *People v. Zimbrolt,* 35 Cal. App. (2d) 745, 91 Pac. (2d) 252;
>
> *Ex parte Twing,* 188 Cal. 261, 204 Pac. 1082.

> "Constructive crimes—crimes built up by Courts with the aid of inference, implication and

strained interpretation—are repugnant to the spirit and letter of English and American criminal law."

Ex parte McNulty, 77 Cal. 164, 168, 19 Pac. 237.

That there is no legislative basis for the prosecution of appellants in the case at bar is shown beyond all cavil in our opening brief. The matters there presented in that behalf may be summarized as follows:

The Congress of the United States **never passed any act** specifically authorizing the President of the United States, or any person deputized by him, **to ration food.** No such power was conferred upon the Price Administrator by the **Emergency Price Control Act of 1942** which, with all of its plenteous delegation of powers, only authorizes the Price Administrator to fix maximum rents for housing accommdations and maximum prices that may be charged for commodities. The act gives him no power to say what **quantity** of any commodity may be sold or purchased. This statement, made in our opening brief (p. 22), is not denied by counsel for the Government.

The powers of the Price Administrator in the matter of the rationing of food **rest upon no statute** at all, but upon an **executive order** or proclamation issued by the President of the United States (Executive Order 9280), which is set forth at page 27 of Appellants' Opening Brief.

This order bears date of December 5, 1942. Prior to that date Congress, on December 18, 1941, had passed

what is commonly known as the First War Powers Act (U.S.C.A. Title 50, appendix, Sec. 601-622), and, on March 27, 1942, the so-called Second War Powers Act, the pertinent portion of which is printed in its entirety in a footnote in appellant's opening brief. (pp. 30-33.) The First War Powers Act authorizes the President to redistribute the functions of governmental executive agencies "for the more efficient exercise and more efficient administration by the President of his powers as Commander-in-Chief of the Army and Navy." **The First War Powers Act is not a penal statute,** but is an emergency grant of power to the President, and contains the proviso that the authority granted "shall be exercised only in matters relating to the conduct of the present war." The Second War Powers Act contains but one penal provision; to-wit, that which is set forth in section a(1) of the Act, paragraph 5. The most casual reading of this section should demonstrate to any lawyer having the most elementary knowledge of the rules of statutory construction, and, indeed, to any intelligent layman, that the section deals in its entirety with contracts and allocations **"for the acquisition, construction, repair, or alteration of complete naval vessels or aircraft or any part thereof,** etc." Tucked away, as it were, in paragraph 2 of the Act is the following language, quoted at page 3 of the Brief for Appellee:

> "Whenever the President is satisfied that the fulfillment of requirements for the defense of the

> United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such condititons and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

How it could be contended by any lawyer who valued his reputation for sanity that this language refers to anything else than defense **materials**, or that it has any reference whatsoever to **food, beggars** our comprehension. It is an elementary rule of law, generally understood by the Courts and members of the profession, that a statute must be read and considered **as a whole**, in order that the true legislative intent may be determined.

The section of the statute quoted by counsel for the Government **does not mention food.** The two words used, each being used twice, are **"material"** and **"facilities."** Certainly, to the mind of the ordinary person of common understanding, a statute dealing with **material** and **facilities** is **not** a statute dealing with **food,** in the absence of some language that would express such an intention on the part of the legislative body. We submit, therefore, that this Court is bound to apply the rule of *noscitur a sociis,* which should be invoked where there is a doubt as to the meaning of a word or expression used by the legislative body in enacting a statute. The color and con-

tent of the doubtful words of a statute are governed by the setting or the associated words.

First National Bank and Trust Co. v. Beach, 301 U. S. 435;

Russell Motor Car Co. v. United States, 261 U. S. 514, 43 S. Ct. 428, 67 L.ed. 788;

Neal v. Clark, 95 U. S. 704, 24 L.ed. 586;

United States v. Baumgartner, 259 Fed. 722.

It has been held by this Court that in construing a statute, the Court must ascertain the legislative intent, not by taking the word or clause in question from its setting and viewing it apart, but by considering it in connection with its context, the general purposes of the statute, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will.

Carter v. Liquid Carbonic Pacific Corpn., 97 Fed. (2d) 1.

Applying this doctrine and looking to the context of section A of the Second War Powers Act, we find that section primarily authorizes the **Secretary of the Navy,** "to **negotiate contracts** for the acquisition, construction, repair or alteration of complete naval vessels or aircraft or any portion thereof." Divers provisions are contained with reference to such contracts, and a prior statute which provides conditions for purchases of supplies and the making of contracts by the United States, enacted June 30, 1936, is referred to. Paragraph 2 deals with deliveries of material under contracts or orders of the Army or Navy.

Immediately thereafter follows the quoted language upon which counsel for the Government relies. Certainly if this paragraph is to be known from its associates, it has no reference whatsoever to the rationing of the food supply of the nation; and *ex necessitate* the penal provisions contained in paragraph 5 of the section have no reference whatever to the violation of orders rationing food. These orders, as heretofore shown, and indeed the whole subject of food rationing, are not provided for by **any** statute, but the power claimed was one assumed by the President of the United States on the assumption that he possessed that power under the Constitution and laws of the United States as Commander-in-Chief of the armed forces. It is significant that the presidential proclamation makes no mention of either of the war powers acts. All this was pointed out in the opening brief of appellants, and counsel for the Government are compelled to rely upon the penal provisions of paragraph 5 of section A of Title III of the Second War Powers Act alone. It is the mere *ipse dixit* of counsel that this penalty applies to cases of food rationing, and they fail to point out any other penal statute which makes it a crime to violate a rationing order, for the good and sufficient reason that **no such statute exists.**

II.

NO FEDERAL COURT HAS EVER HELD ADVERSELY TO THE CONTENTION OF APPELLANTS THAT CONGRESS HAS FIXED NO PENALTY FOR DISOBEDIENCE OF A RATIONING ORDER.

A number of decisions are cited by counsel for the Government, but none of them passes upon the question here involved. Most of them are not even remotely in point. We shall deal with them in the order set forth in the brief of appellee.

Bowles v. Quon, 154 Fed. (2d) 72, was, as stated by counsel, a civil case, in which it was ruled that the Administrator was entitled to an injunction against sales of rationed meats without obtaining point values.

Coleman v. United States, 153 Fed. (2d) 400, was a prosecution for making false statements in a matter within the jurisdiction of a department or agency of the United States, and of violating a ration order. Only one point was urged by the appellant as a ground for the reversal of his conviction, to-wit, that information and documents obtained from him by the Office of Price Administration could not be used against him in a criminal proceeding. The Circuit Court of Appeals for the Sixth Circuit ruled adversely to this contention. The point that Congress never had made the violation of a ration order a crime is not discussed in the opinion, undoubtedly for the reason that it was never raised by counsel or called to the attenttion of the Court. The point

of the discussion was that the use of defendant's own records to prove his failure to keep proper data did not infringe upon the rule against self-crimination. The point that defendant was not, and could not be, guilty, because Congress had not seen fit to make any of his acts punishable as a crime, was not before the Court, and was not passed upon.

Identical comment may be made on *United States v. Schnoll,* 142 Fed. (2d) 704. The defendant was there charged with selling twenty-four cans of peaches to a woman who acted as an *agent provocateur* for some federal officer, without taking a ration stamp from the purchaser. The defendant made the very plausible defense of entrapment and the equally plausible contention that the evidence was insufficient. We need not comment upon the justice of the decision, because whether just or unjust, it has no bearing on the case at bar. It was not suggested to the Circuit Court of Appeals of the Seventh Circuit that the defendant was charged with something which was not a crime.

We temporarily pass *Steuart v. Bowles,* 322 U. S. 398, 64 S. Ct. 1097, 88 L.ed. 1350, for the reason that we shall presently show that it settles the question here involved *against the Government.*

Brown and Sons v. Bowles, 58 Fed. (2d) 322, was a decision in an injunction matter by a *nisi prius* Court.

Bowles v. Lee's Ice Cream Inc., 148 Fed. (2d) 113, *County Garden Market v. Bowles,* 141 Fed. (2d) 540,

and *Gallagher State House v. Bowles,* 142 Fed. (2d) 530, all involved suspension of licenses of food dealers and not criminal prosecutions. After citing these decisions, the United States Attorney says (Brief for Appellee, p. 5):

> "Appellant's contention that Congress could not validly impose criminal liability for a violation of a regulation or order of the Administrator has been settled adversely to the appellant by the decision of the Supreme Court of the United States in *Kraus Bros. v. United States,* 66 S. Ct. 705."

To this statement there are two answers:

First, appellants did not contend that Congress **could not** validly impose criminal liability; their contention was that Congress **did not** impose criminal liability, for a violation of a ration order.

Second, *Kraus Bros. v. United States,* supra, was a prosecution for violating, not a **ration order,** but a **price order** of the Price Administrator. Congress and not the Administrator has made it a crime to violate a price regulation order. In fixing prices, as heretofore shown, the Administrator acts under the Emergency Price Control Act, penalties for the violation of which are **fixed by Congress.** But when the Administrator made a ration order (this Court knows judicially that the only commodity now rationed is sugar), he acted under the presidential proclamation, assumed to be issued under the authority of the war powers act, **which prescribed no penalty.**

Randall v. United States, 148 Fed. (2d) 234, also cited by the United States Attorney, should be wholly disregarded because it contains a statement which is demonstrably at variance with the decision of every other Court which has ever passed upon a similar question of constitutional law. The sentence which we refer to reads:

"The Congress acted within constitutional bounds **when it delegated the power to fix and define crimes and penalties for crimes,** as provided in the act here under construction."

This statement is a gigantic error.

First, if there is a single principle of constitutional law irrevocably settled, it is that **Congress cannot delegate the power to fix and define crimes and penalties for crimes.** It may delegate the power to make **rules and regulations,** and to provide that a violation of such rules and regulations shall be a criminal offense; but Congress, and not the rulemaking officers, must say that the act is criminal; Congress and not the official, must provide the extent of the punishment. If the statement in *Randall v. United States,* is the law, then Congress can confer upon any official, from the President of the United States down to every petty officer, the power to create crimes and misdemeanors and to fix the penalty at anything from the payment of a small fine to death. If such be the law, the doctrine of separation of powers which is the very basis of constitutional government is swept away in one sentence. **But it is not the law.** The Supreme Court of the United States has specifically said that:

> **"The legislature cannot delegate to an administrative board the authority to fix the penalty for a violation of orders or regulations which the legislature authorized the board to make. The penalty must be fixed by the legislature itself."**
>
> *Panama Refining Co. v. Ryan,* 293 U. S. 388, 55 S. Ct. 241, 79 L.ed. 446.

The statement of *Randall v. United States, supra,* must have been wholly inadvertent. In any event, it is a decision of another circuit, which this Court is not bound to follow and certainly should not follow.

The cases cited in *Randall v. United States* certainly contain nothing which lends any support to the language of the Circuit Court of Appeals in the *Randall* case. *Korematsu v. United States,* 323 U. S. 214, 65 S. Ct. 193, and *Hirabayashi v. United States,* 320 U. S. 81, 63 S. Ct. 1375, 88 L.ed. 1774, involved convictions of persons of Japanese descent for violating certain orders made by the Military Commander of the Pacific Coast Area in a time of public peril. The Military Commander did not fix the penalty for violation of his order; the punishment was prescribed by an act of Congress.* Accordingly, those decisions are not in point.

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*In the act of March 21, 1942 (56 Stat. 173), it was provided: "That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive Order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a

III.

THE SUPREME COURT OF THE UNITED STATES HAS DEFINITELY HELD THAT A VIOLATION OF A RATION ORDER IS NOT PUNISHABLE AS A CRIME.

In *Steuart v. Bowles,* supra, one of the very cases cited by counsel for the Government, the petitioner brought suit for an injunction to enjoin the Office of Price Administration from enforcing an order suspending a dealer in petroleum products for violating a certain ration order adopted by the Price Administrator. The Supreme Court of the United States held that the District Court had properly dismissed the suit, and that the authority given to allocate "materials" carried with it the power to issue suspension orders against retailers. It is specifically held, however, that the power to prescribe penalties rests with Congress, and that Congress had not prescribed the same. This appears from the following language of Mr. Justice Douglas, who delivered the opinion of the Court:

> "We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute. United States v. Two Hundred Barrels of Whiskey, 95 US 571, 24 L. ed. 491; Campbell v. Gleno Chemical Co., 281 US 599, 74 L. ed. 1063, 50 S. Ct. 412; Wallace v. Cutten, 298 US 229, 80 L. ed. 1157, 56 S. Ct. 753, supra. Hence we would have no difficulty in agreeing with petitioner's contention if

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misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense."

> **the issue were whether a suspension order could be used as a means of punishment of an offender. But that statement of the question is a distortion of the issue presented on this record."**

Thus the high court distinctly holds that **violations of ration regulations** may be enforced by **injunctions in civil suits,** or by **suspension of licenses,** but **not by criminal prosecutions.**

Congress has neither made it a crime to violate a ration order nor prescribed any penalty for such violation. The only attempt to make such a violation a crime is an order made by the Administrator himself, a power never before asserted or attempted to be exercised by an administrative officer of any constitutional government. The time has not yet come when a free people living under a bill of rights can be deprived of their life, liberty or property by the decree of a public functionary. To sustain the exercise of such power would be, we submit, a death-blow to all liberty and constitutional rights in the land.

Dated, San Francisco, California,
June 17, 1946.

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